

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOYCE HENDERSON GELLER,

Plaintiff,

v.

HAI NGOC DUONG, et al.,

Defendant.

Case No. 10cv1876-BTM (CAB)

ORDER RE MOTION TO REMAND

Pending before the Court are motions to remand [dock. 8], dismiss [dock. 7], and drop Defendant Duong as a sham defendant [dock. 6]. For the reasons that follow, the Court **GRANTS** Plaintiff's motion to remand. Because the amount in controversy does not exceed \$75,000, the Court need not address the parties' arguments regarding diversity and accordingly, the Court **DENIES** Defendants' motion to drop Duong as a sham defendant as moot. Because the Court does not have subject matter jurisdiction over this controversy, the Court **DENIES** Defendants' motion to dismiss as moot.

I. BACKGROUND

On December 9, 2008, Plaintiff was involved in an automobile accident with Hai Ngoc Duong ("Duong"), who was insured by Liberty Mutual Fire Insurance Company ("Liberty Mutual"). (Compl. ¶10.) Plaintiff thereafter brought a personal injury suit against Duong. (Compl. ¶11.) Plaintiff entered into settlement negotiations with Liberty Mutual, and the parties agreed to a \$10,000 settlement. (Compl. ¶ 14-15.)

1 Plaintiff asserts that during settlement negotiations, Defendants misrepresented the
 2 terms of the personal automobile insurance policy that was issued by Liberty Mutual on
 3 behalf of Duong. (Compl. ¶ 10.) Specifically, Plaintiff alleges that Defendants falsely claimed
 4 that “although the policy limit was \$25,000, the policy specifically called for an offset of
 5 \$15,000 making the policy limit \$10,000,” inducing Plaintiff to settle for only \$10,000. (*Id.*)

6 Based on this alleged misrepresentation, Plaintiff brought an action in state court
 7 against Liberty Mutual and Duong for fraud and negligent misrepresentation. Liberty Mutual
 8 removed to federal court pursuant to 28 U.S.C. § 1441, on the ground that this Court had
 9 original jurisdiction under 28 U.S.C. § 1332.

10 11 **II. DISCUSSION**

12 Under 28 U.S.C. § 1441(a), district courts have removal jurisdiction over any claim
 13 that could have been brought in federal court originally. *Hall v. N. Am. Van Lines, Inc.*, 476
 14 F.3d 683, 687 (9th Cir. 2007). This removal statute is strictly construed against removal
 15 jurisdiction. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). In diversity cases, where
 16 the amount in controversy is in doubt, “[t]here is a strong presumption that the plaintiff has
 17 not claimed a large amount in order to confer jurisdiction on a federal court.” *Singer v. State*
 18 *Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 375 (9th Cir. Cal. 1997) (quoting *St. Paul Mercury*
 19 *Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938)). Where, as here, “the complaint does
 20 not specify the amount of damages sought, the removing defendant must prove by a
 21 preponderance of the evidence that the amount in controversy requirement has been met.”
 22 *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683 (9th Cir. 2006).

23 In the Notice of Removal, Liberty Mutual asserts, “In light of the Plaintiff’s fraud-based
 24 claims seeking compensatory and consequential damages, attorney’s fees and, potentially,
 25 punitive damages, the \$75,000 amount in controversy requirement is satisfied.” (Notice at
 26 2.) Although Plaintiff’s complaint does not demand a dollar amount, it is clear this dispute
 27 centers on whether Defendants misrepresented a \$25,000 insurance policy, \$10,000 of
 28 which has already been paid to Plaintiff. Given the amount of compensatory damages at

1 issue, Defendants do not and cannot credibly claim that consequential damages and
 2 attorney's fees raise the amount in controversy above the \$75,000 threshold. Thus,
 3 Defendants must rely on punitive damages to satisfy the amount in controversy requirement.¹

4 5 A. Punitive Damages

6 "It is well established that punitive damages are part of the amount in controversy in
 7 a civil action." *Gibson v. Chrysler Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). However, "the
 8 mere possibility of a punitive damages award is insufficient to prove that the amount in
 9 controversy requirement has been met." *Nguyen v. Hartford Cas. Ins.*, No. CIV06-2541,
 10 2007 U.S. Dist. LEXIS 55369, at *9 (D. Ariz. July 27, 2007) (citation and quotation omitted).

11 Here, as was the case in *Nguyen*, Defendants offer nothing more than the "mere
 12 possibility" of punitive damages. In their opposition, Defendants assert only the undisputed
 13 proposition that punitive damages are part of the amount in controversy. (Opp. at 4.) They
 14 provide no estimate for how much punitive damages would be available to Plaintiff in the
 15 instant case. See *Nguyen*, 2007 U.S. Dist. LEXIS 55369, at *9. Similarly, Defendants
 16 provide no evidence "of the likelihood of [Plaintiff] recovering punitive damages based upon
 17 evidence of jury verdicts in analogous cases." *Id.* (citation and quotation omitted). Simply
 18 pointing out that Plaintiff is seeking punitive damages without proffering any evidence
 19 regarding the amount is insufficient to establish that the potential punitive damage award will
 20 more likely than not increase the amount in controversy above \$75,000. See *id.* at *11.
 21 Thus, because the amount in controversy has not been met, the Court lacks subject matter
 22 jurisdiction over this civil action.

23 B. Attorney's Fees

24 Although the Court finds that Liberty Mutual has not *satisfied its burden* of showing
 25 that the amount in controversy has been met, the Court concludes that Liberty Mutual had
 26 a reasonable basis for removal. See *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141

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 28 ¹ Plaintiff disputes that she is seeking any punitive damages. (Reply at 7.) However,
 Plaintiff's prayer for relief seeks, in part, "other and further relief as the Court deems proper."
 This Court assumes that such "further relief" could include punitive damages.

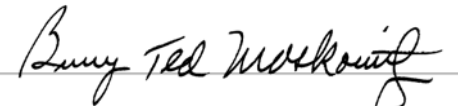
1 (2005); *see also Nguyen*, 2007 U.S. Dist. LEXIS 55369 (attorney's fees and costs not
2 awarded). Therefore, the Court denies Plaintiff's motion for attorney's fees and costs.

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4 **III. CONCLUSION**

5 For the reasons discussed above, Plaintiff's motion to remand is **GRANTED**. This
6 action is **REMANDED** to the Superior Court of California, County of San Diego. The Court
7 denies Plaintiff's requests for attorney's fees and costs associated with bringing the motion
8 to remand. The Court **DENIES** as moot the remaining motions that were pending in this
9 case.

10 **IT IS SO ORDERED.**

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13 DATED: December 7, 2010

14 
15 Honorable Barry Ted Moskowitz
16 United States District Judge
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